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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS,

v.

PATSY T. MINK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

This reply brief is submitted to clarify two matters raised in respondents' brief: (1) The relationship between the discovery proceedings held in the *Nuclear Responsibility* litigation (which sought to enjoin the Cannikin test) and this action under the Freedom of Information Act, and (2) the effect of the new Executive Order, No. 11652, on the issue in this case as to Exemption 1 of the Act.

I. RELATIONSHIP TO THE NUCLEAR RESPONSIBILITY CASE

Respondents argue that the treatment of six of the nine documents here involved in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783,

788, 796 (C.A.D.C. 1971) (hereinafter referred to as the *CNR* case), has an important bearing upon the disposition of this case.[1] They argue that the judicial examination of some of the documents in that case robs this case of significance, constitutes an acquiesence by the government in the practice of *in camera* inspection, and demonstrates the feasibility of court screening of documents for the purpose of releasing portions found to be "non-secret components."

In the *CNR* case, which was a suit brought by environmental groups to enjoin the proposed Cannikin underground nuclear test, the plaintiffs sought discovery of government reports relating to Cannikin in order to establish their claim that the AEC had failed to give adequate consideration to environmental issues. See 463 F. 2d 783–788 (C.A.D.C.). The court of appeals held that "[*i*]*n camera* inspection of allegedly privileged documents * * * is a procedure approved by the courts *at least where, as here, military and diplomatic secrets are not at issue.*" 463 F. 2d 788, 792 (C.A.D.C.) (emphasis added). The court stressed that the district court would examine only documents from which the gov-

[1] The record in this case does not contain information concerning the subsequent treatment of the nine documents here involved. Factual statements relating either to government actions or to court orders in the *CNR* case which have affected the availability or classification status of some of the nine documents are sprinkled throughout the briefs. In order to assist the Court in its understanding of the current factual situation, a document-by-document summary is included as Appendix A to this reply brief, *infra*, pp. 11–15.

ernment previously had excised "any and all materials reflecting military and diplomatic secrets as distinguished from possible environmental hazards of the test" (463 F. 2d at 790, 792; see also the district court order reprinted at 795); and this procedure was in fact carried out.[2]

The failure of the government to seek review by certiorari of the rulings by the court of appeals in the *CNR* discovery proceedings was not an acquiesence by the government in the practice of *in camera* review of allegedly privileged material. The question arose in discovery proceedings in which a civil litigant seeking to enjoin the test had established a need for certain materials in the government's possession. The principal objective of the government in the *CNR* case was to allow the Cannikin test to proceed. The government was successful in opposing an injunction of the test, and its tactical decision not to seek review on a procedural point did not constitute a waiver of any position asserted in this separate litigation.

More fundamentally, however, the decision in the *CNR* case does not support Respondents' position. The three most important and sensitive documents in this case—the Irwin memorandum [Irwin Affidavit, para. 5A], the Irwin committee report [para. 5B], and the Kissinger report [para. 5B–2]—were neither produced nor examined in that litigation. Moreover, *no*

[2] See the transcript of the *in camera* proceedings held October 30, 1971, before the district court in the *CNR* case (D.D.C., Civil Action No. 1346–71), p. 2, which we are lodging with the Clerk.

classified material was examined by the district court in the CNR case.[3]

In this case, unlike the *CNR* litigation, the court of appeals directed the district court to "take evidence on whether, and to what extent," the withheld documents contain "non-secret components [which] are separable from the secret remainder and may be read separately without distortion of meaning * * *" (Pet. App. A, 27). This task would require the district court to undertake two functions which were avoided in the *CNR* case: first, *in camera* inspection of classified documents; and second, judicial determination of whether all or part of a document shown to involve a major test of a military weapon was properly classified as secret. These are functions which are committed to executive discretion in the absence of any indication that the classification was arbitrary or capricious. *Epstein* v. *Resor,* 421 F.2d 930, 933 (C.A. 9), certiorari denied, 398 U.S. 965; *Moss* v. *Laird* (D.D.C., Civil Action No. 1254–71, decided December 7, 1971).

Finally, we note that the district court's examination in the *CNR* case of the unclassified materials in four documents to determine whether they fell within the evidentiary privilege for intra-executive advice provides independent corroboration for the statement in the Irwin affidavit in this case that these documents "were prepared and used solely for transmittal to the Presi-

[3] See Appendix A of this brief (*infra*, pp. 11–15) a description of the documents involved in this case and actions taken concerning them; see Appendix B (*infra*, p. 16) for a table summarizing these actions.

dent as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints * * *" (App. 28-29).[4] An *in camera* inspection of documents which an affidavit establishes are at the core of an evidentiary privilege or of an exemption to the Freedom of Information Act is unnecessary as well as unwise since it threatens the purpose of the privilege itself. But where an inspection for the limited purpose of determining whether a claim of privilege is arbitrary has already occurred, the Court may obtain some assurance from the fact that the documents examined were found to comport fully to the description of them contained in the Irwin Affidavit.[5]

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[4] The court found that three documents consisted in their entirety of privileged intra-executive advice and recommendations: Ruckelshaus letter, Train letter, and David letter (all three referred to in para. 5c of the Irwin affidavit), and the fourth document, the CEQ memorandum (para. 5b–5 of Irwin affidavit), was found to contain both intra-executive advice and purely factual material. Portions falling into the former category were excised and the remainder of the document was made publicly available and is no longer in issue.

The court's treatment of these materials thus also serves to confirm the correctness of the government's claim that these materials fall squarely under Exemption 5 of the Freedom of Information Act.

[5] Respondents also argue that it is "incongruous" to interpret the first exemption of the Act as including material classified pursuant to executive order when it does not include material classified as "Restricted Data" pursuant to the specific provisions of the Atomic Energy Act, 42 U.S.C. 2014(y), 2161, 2162. Respondents' Brief, p. 28, n. 23. If there is an incongruity, it is one that is built into the Freedom of Information Act. The first exemption of the Act, 5 U.S.C. 552(b)(1), cov-

II. EFFECT OF THE NEW EXECUTIVE ORDER

1. Respondents assert that the new Executive Order No. 11652, which on June 1, 1972 superseded Executive Order No. 10501 under which the documents at issue in this case were classified, drains this case of importance and "effectively" moots it. Respondents' Brief, p. 28. For that proposition, respondents advance the following argument. They claim that the new Executive order has "ratified" the decision of the court of appeals below by adopting the requirement in its Section 4(A) that a document originated after June 1, 1972 and classified under the new Executive order be marked "to the extent practicable" to show "which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." Respondents say that the documents at issue here have not been reexamined under the provisions of the new Order, and that if they were the segment-by-segment classification review ordered by the court of appeals would have to be performed. Finally, respondents suggest that the

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ers matters "specifically required *by Executive order* to be kept secret in the interest of the national defense or foreign policy." Material which Congress by statute has prohibited from disclosure is not dealt with under this exemption. The third exemption, however, refers to matters that are "specifically exempted from disclosure by statute," language that clearly includes documents classified pursuant to the Atomic Energy Act. Although this exemption is applicable to some of the documents involved in this case, it has not been asserted by the government.

opinion of the court of appeals below may fairly be characterized as requiring only that the executive examine the documents segment-by-segment for declassification purposes, without an *in camera* review of its determinations by the district court.

2. The new Executive order clearly does not drain this case of importance. Large quantities of documents—including those at issue in this case—were classified under Executive Order 10501, some as recently as May 1972, and they remain in government files. The drafters of the new Executive order were acutely aware of the problems created by this vast amount of material, and made provisions for its handling which went in their view as far toward promoting the policy of the new Order to make more information available to the public as could be done without imposing an unsustainable burden on the agencies possessing this material. The new Order does not require the reclassification of every document classified under the old order, just as if it had been originated after June 1, 1972. Instead, it provides in Section 5(D) that (1) material subject to scheduled declassification under the old order (Group 4 material) will be subjected to automatic downgrading and declassification under the General Declassification Schedule established by Section 5(A) of the new Order, and (2) all other 10501 material will be treated as if exempted from the General Declassification Schedule, and will be subject to the manda-

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tory review provisions of Section 5(C) of the new Order. Under Section 5(C), classified documents more than 10 years old must be subjected (on request by another agency or a member of the public) to a substantive classification review by the originating agency to determine whether they currently fall into one of the four exemption categories set out in Section 5(B) of the Order. If the document does not fall into one of those categories on review it must be declassified. If it does, the document is to be so marked and a declassification date set if possible.

The documents involved in this case are less than 10 years old and the mandatory review provision of the new Order would therefore be inapplicable. Even if the documents were more than 10 years old, a paragraph-by-paragraph review would not be required by the Order as the respondents claim. The Order requires only that a determination be made as to whether there is any information or material that would qualify the document for exemption from the General Declassification Schedule under Section 5(B) of the new Order. Section 4(A) of the New Order is not applicable. Section 4(A) is a marking requirement intended to apply where new documents are classified under the new Order. Its primary purpose, as is indicated by the quotation on page 30 of the respondents' brief from the President's statement at the time the new Order was issued, is to prevent unnecessary classification of

new documents when they incorporate innocuous portions of previously classified documents. It is not intended to require a paragraph-by-paragraph review by either the executive or a court of previously classified documents with a view to public release of portions determined upon review to be innocuous.

3. The respondents suggest (Respondents' Brief, p. 32) that the court of appeals meant only to require the government to review the documents itself. Part III of that Court's opinion indicates, contrary to respondents' assertion, that an *in camera* inspection clearly was directed by the court of appeals (Pet. App. A, p. 28).

Respondents' effort to remove from this case the important issue of who is intended by the Freedom of Information Act to make the decisions as to the necessity of classification under the standards of the applicable Executive orders is some indication of the difficulty of their position. The new Executive Order and the first exemption to the Freedom of Information Act intend to keep that decision where it is in cases like the present one—with the executive branch. Where an affidavit has clearly established that classified documents fall in the very core area of the President's responsibilities in the national defense and foreign policy area, the Freedom of Information Act did not intend a court to examine the classified documents itself with a view to second guessing the executive on the necessity of classification.

CONCLUSION

For the foregoing reasons, and for those set forth in our main brief, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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NOVEMBER 1972.

APPENDIX A

Status of Documents in Issue

1. *Irwin Memorandum* [para. 5A].[1] This memorandum was prepared for the President by Under Secretary of State John N. Irwin, II on July 17, 1971 in his capacity as Chairman of the Under Secretaries Committee of the National Security Council. It was separately classified as Top Secret and Restricted Data at that time and presently is classified Top Secret and Formerly Restricted Data. It was not examined by the district court in the *CNR* case. The government contends that this document is exempt from nondisclosure under both the first and the fifth exemptions of the Freedom of Information Act.

2. *Report of the Under Secretaries Committee* [para. 5B]. This National Security Council document, dated July 17, 1971, is the formal report of the Under Secretaries Committee concerning the proposed Cannikin test. The report, which is 32 pages long, was separately classified as Top Secret and Restricted Data. It was not examined by the district court in the *CNR* case and retains its original classification. The government contends that the report is exempt from disclosure under both the first and the fifth exemptions of the Freedom of Information Act. Five sets of documents, 3 through 7 below, were attached to this report in the form in which it was transmitted to the President.

3. *Seaborg letter and attachments* [para. 5B–1]. This letter of April 14, 1971, and its attachments, from then Chairman Seaborg of the Atomic Energy Commission to Chairman Irwin of the Under Secre-

[1] Bracketed references are to parts of paragraph 5 of the Irwin Affidavit (App. 28–29).

taries Committee was separately classified as Secret and as Restricted Data. The classification of this material was reviewed by the AEC in connection with the request for its discovery in the *CNR* case. As part of this review all classified information was excised from the material and the remaining declassified portions were examined by the district court *in camera*. Civil Action No. 1346–71, transcript of October 30, 1971 p. 3 (hereafter "Oct. 30 Tr."). The district court ordered that portion of the unclassified version which had a bearing on environmental matters to be made available to the plaintiffs and this material was then released to the public. The government contends that the undisclosed portions of the document, now separately classified as Secret and as Restricted Data, are immune from disclosure under both the first and fifth exemptions of the Freedom of Information Act.

4. *Report of the NSC Defense Program Review Committee (Kissinger Report)* [para. 5 B–2]. This report was prepared at the request of the National Security Council for the use of the Under Secretaries Committee and transmitted under a cover memorandum of Dr. Henry Kissinger to Under Secretary Irwin dated June 16, 1971. The Report, which was separately classified as Top Secret and as Restricted Data, continues to be so classified, ~~as Restricted Data.~~ This Report was not made available to or examined by the district court in the *CNR* case.

5. *AEC Environmental Impact Statement on Cannikin Project* [para. 5 B–3]. This document, dated June 1971, was prepared by the U.S. Atomic Energy Commission in compliance with the requirements of the

National Environmental Policy Act. It has been publicly available since its completion and is not in controversy here.

6. *Transcript of AEC Briefing on Cannikin to Under Secretaries Committee* [para. 5 B–4]. This document is an edited transcript of remarks by five AEC briefers given orally to the Under Secretaries Committee on December 15, 1970. The transcript was separately classified as Secret and as Restricted Data in 1970, but its classification was reviewed in connection with the discovery proceedings in the *CNR* case. The classification of two segments, containing the remarks of Dr. Glenn Seaborg and of Dr. Michael May, was confirmed as a result of this review and these segments were not made available to the district court in that case. The other three segments, containing the remarks of Dr. M. L. Merrit, Dr. W. G. Van Dorn, and Dr. J. W. Hadley, were declassified after this review and were released to the public except for some conclusory matter on the final page of Dr. Hadley's segment. The segment involving Dr. Merritt is reprinted in part as Appendix D to Respondents' Brief. The declassified portions are no longer in controversy here, but the government contends that the undisclosed portions are immune from disclosure under both the first and the fifth exemptions of the Act.

7. *CEQ Memorandum on Potential Environmental Hazards of Cannikin* [para. 5B–5]. This memorandum to Mr. Irwin from the Council on Environmental Quality, dated December 2, 1970, was not separately classified. It was examined *in camera* by the district court in the *CNR* discovery proceedings and portions of it dealing with environmental matters and not containing

policy advice were ordered disclosed to the plaintiffs in that litigation. The disclosed portion has been made available to the public and is reprinted as an appendix to Respondents' Brief in Opposition (pp. 23–28). The government contends that the undisclosed portions fall within the fifth exemption of the Act. No first exemption claim is made with respect to this material.

8. *Ruckelshaus Letter* [para. 5C]. This letter of Mr. William D. Ruckelshaus of the Environmental Protection Agency to the Under Secretaries Committee, dated July 15, 1971, was apparently classified as Top Secret and as Restricted Data because it was physically attached to classified material. The letter was subsequently declassified by EPA and AEC. The district court in the *CNR* discovery proceedings examined the letter and concluded that it was "intra-executive" advice which was privileged from disclosure. Oct. 30 Tr., p. 13. The government claims that this letter is immune from disclosure under the fifth exemption of the Act. No first exemption claim is presented with respect to this letter.

9. Train Letter [para. 5C]. This document of July 6, 1971 was addressed to Under Secretary Irwin and signed by Mr. Russell E. Train, Chairman, Council on Environmental Quality. It was apparently classified as Top Secret and as Restricted Data only because it was attached to the Under Secretary's report. Since the Train letter, when detached from the Irwin report, does not contain classified material, it was made available to the district court in the *CNR* case. It was described by the district court as containing "32 words and one date" and "no environmental information of any sort," and was not ordered disclosed. Oct. 30 Tr., pp. 13–14. The

government contends that the Train letter is exempt from disclosure only under the fifth exemption of the Act.

10. *David Letter* [para. 5C]. This letter from Dr. Edward E. David, Jr., Director of the Office of Science and Technology, to the Under Secretaries Committee, dated July 9, 1971, was separately classified as Top Secret and as Restricted Data. A portion of the letter was examined by the district court in the *CNR* litigation after removal of all information which the Office of Science and Technology determined was classified. The district court, stating that the remaining material "reflects intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making processes," did not order disclosure. Oct. 30 Tr., p. 12. The government contends that this letter is protected under both the first and fifth exemptions of the Act.

A tabular presentation of this information concerning the present status of the ten documents is reprinted on the following page. In general, it follows the form of the table in Respondents' Brief (p. 18a) but contains additional material.

APPENDIX B

Irwin Affidavit Reference	Item	Description	Publicly Available	First Exemption Invoked	Fifth Exemption Invoked	Already Reviewed *in camera* in CNR Case	Made Available on Discovery in CNR Case
Para. 5A	1.	Irwin Cover Memo (July 17, 1971)	No	Yes	Yes	No	No.
Para. 5B	2.	Report of Irwin Committee (July 17, 1971)	No	Yes	Yes	No	No.
Para. 5B1	3.	AEC-Seaborg Letter (April 14, 1971)	Parts	Parts [2]	Parts [2]	Yes (unclassified portions only)[1]	In part only.
Para. 5B2	4.	Kissinger Report (June 16, 1971)	No	Yes	Yes	No	No.
Para. 5B3	5.	Cannikin Environmental Impact Statement	Yes	No	No		
Para 5B4	6.	AEC Briefing Transcript (Seaborg, May, Merritt, Van Dorn, Hadley) (December 15, 1970).	Parts	Parts [2]	Parts [2]	Yes (unclassified portions only)[1]	In part only.
Para. 5B5	7.	CEQ Memorandum (December 2, 1970)	Parts	No	Parts [2]	Yes (with portions deleted)	In part only.
Para. 5C	8.	Ruckelshaus Letter (July 15, 1971)	No	No	Yes	Yes [3]	No.
Para. 5C	9.	Train Letter (July 1, 1971)	No	No	Yes	Yes [3]	No.
Para. 5C	10.	David Letter (July 9, 1971)	No	Yes	Yes	Yes (unclassified portions only) [1]	No.

[1] The classification of these documents was reviewed in connection with the discovery proceedings in the *CNR* case. The district court examined only portions of the documents, after classified material was removed by the government. This action amounted to a partial declassification of the documents in question.

[2] The government contends that the unreleased portions of these documents are protected from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b). The released portions are not in issue.

[3] The submission of these documents on *in camera* inspection amounted to a declassification of the relevant materials.

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